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A szerződési szabadság értelmezése a modern polgári jogban

Szerző: Béky Ágnes Enikő

Béky Ágnes Enikő[1]: A szerződési szabadság értelmezése a modern polgári jogban

A szerződések joga a polgári és kereskedelmi jog egyik legdinamikusabban fejlődő jogterülete napjainkban. A szerződéskötési technikák, a szerződések teljesítése, valamint a szerződéstípusok köre is új tartalommal telítődik. A jogterület fejlődésének és népszerűségének alapköve a római jogban gyökerező szerződési szabadság mai napig fenntartott tétele. A szerződési szabadság négy fő aspektusa (szerződéskötés szabadsága, partnerválasztás szabadsága, típusszabadság, tartalom szabadsága) biztosítja, hogy a szerződések jogának szabályai könnyen alkalmazkodnak a társadalmi, gazdasági változásokhoz. A szerződő felek jogviszonyukat személyre szabottan alakítják, az e köré keretet építő kontraktus szabályait nagyfokú szabadsággal formálhatják. A szerződések jogának alapelve a modern jogrendszerek alappillére, azonban értelmezése, megítélése államonként és időszakonként változik. Ez a változás sosem tekinthető visszalépésnek, vagy az alapelv lényegi jelentését átértékelő, lerontó változásnak. Az azonban kétségtelen, hogy a szerződési szabadság alapelvi szintű elismertsége egyes nemzetek jogrendszerében valódi operatív alapelvként jogvitát eldöntő, joggyakorlatot fejlesztő mozgatórugó, míg más nemzetek jogalkotásában és jogalkalmazásában az állandóság megtestesítője e gyorsan változó jogi környezetben.

A tanulmány a szerződési szabadság aspektusainak jelentéstartalmát elemzi a kontinentális és az angol-amerikai jogrendszerek írott szabályainak és jogalkalmazási gyakorlatának függvényében. A jogtudomány értelmezései, konkrét jogesetek szentenciái, valamint az írott jogforrások indokolása adja a tanulmány kiindulópontját. A szerződési szabadság korlátlan érvényesülését „lerontó” szabályok (pl. szerződéskötési kötelezettség, formakényszer, stb.) az alapelv céljának és létének fényében kerülnek vizsgálat alá. Az angolszász rendszerekben az alapelv által generált jogfejlesztő értelmezés a kontinentális jogok lassan változó szemléletével ütközik.

A tanulmány célja, hogy a szerződési szabadság alapelvének funkcióját megvilágítva bemutassa azt a lineáris jogfejlődést az európai jogi tudományosságban, mely a mai tartalommal ismert alapelvet alkalmassá teszi a szerződések jogában fejlődést generáló és iránymutató szerepkör betöltésére.

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Ágnes Enikő Béky[1]: Interpreting freedom of contract in modern civil law

Contractual relations have a huge significance in the modern life of law. Contracts grew beyond simple transactions of the parties and developed as a basic foundation of international commercial relations. It can be weird for the first time that the general rules for contracts in the European Civil Codes did not change much in the last decades although the changes in their significance can be experienced in any area of civil law. One of the essential lemmas of the law of contracts is its constitutional starting point, the elementary freedom to contract. This basic principle formed under the old Roman law and accepted by most of the European codification results and jurisdiction in the Anglo-American legal system.[2] If we take just a brief look at this principle under different legal systems, we can realize that its meaning is almost the same everywhere. But getting a closer look will help us understanding some existing limits and well-known legal institutions of contractual regulations. This study volunteers to define this basic principle from a different point of view in some major European legal system.

Contracts are usually made voluntarily between two or more equal parties without any kind of government intervention. The agreement between these parties generates rights and obligations almost in every contract on both sides. Individual human beings have their natural right to make their own choices in various ways of life. They have the ability to establish fully binding agreements and undertook obligations that can generate liability in case of false performance.

Contractual relationships can be various in kinds. A contract can be made between different kinds of parties such as individuals or between individuals and collective parties, legal entities, even between individuals and the state itself. In the letter situation the state does not have more or special rights, so it plays a civil obligator under these legal relations. The formation of a contract can be managed in several forms. The ancient orient of the contracts was orally made between the parties. The form of these agreements were widely accepted and got its own validity from the custom of accepting the way it was formed. This was a simple but practical solution to establish a binding obligation. As time passed and life became more complicated the way of establishing a contact was also changed and this changing is still in progress.[3] Recently entities are finding new ways of how to put down their agreements in various kinds of topics. A contract can be made on a written signed and witnessed way, which is still the most popular way of forming it. The reason of the popularity can be understood because somehow it gives a secured feeling for both parties that their agreement was put on a paper and it can be proved and enforced in front off the court. Although the normal method of enforcing should not be straight heading to the court room as several other, more efficient and less costly way exist in solving the debate. The law realized this claim from the society and created rules for the formal criterions of several contracts: some of them are valid only in written form, others need a verification by a lawyer. The main rule remained the orally established contract. The parties can also communicate to each other with using multiple channels for forming their agreements. Now as the internet is accepted by the law as a communicational channel, more and more persons have the chance to make an advantage of it and use the internet to get some very special product from the other side of the world or even order some simple products such as books, clothes etc. These contracts cross the borders. When these people surf on the web and decide to order and buy a product online and pay the price for it by using their credit cards or online paying systems such as Paypal[4], we can say that they apply a modern source of agreements that is not written and not oral. They also have rights and obligations on a similar way to those sit in the same room /getting together/ and sign the contract in front of witnesses on a traditional way. The legislator has certain duties to ensure and accept the binding power of these agreements similar to the classical forms.[5]

As we look over the hole proceed of establishing a contract, we discover the inadmissibility nature of the rules of obligations. This freedom can be examined at the roots: the principles of contract law. These principles are the basic elements of the civil contractual relations: not only declarative sentences but effective rules of solving an exact situation. Principles were created through several years and as time passed and situations have changed, the meaning of them became wider and wider. When a situation comes to establish an agreement, these principles should be kept strictly by the contractual parties otherwise their behaviour will be sanctioned.

Several principles can be found in the Hungarian Civil Code, and all of them have effects on the parties when establishing a contract such as in other countries. Most of the principles can be found in the European Civil Codes such as good faith, liability, autonomy of the parties, the duty to cooperate and some are put down in separated acts.[6] Among these principles we can find some that created exclusively for contract law. These principles are: freedom of contract, presumption of reciprocity, pacta sund servanda, clausula rebus sic stantibus. One of the oldest principles is the collaboration between the contractual parties, but no doubt that one of the most important principle is the freedom of contract.

The idea of freedom of a contract is originating from John Lock, the famous British philosopher. He strongly believed that society works on its best way and can go further to develop and get on a higher level if contracts will be freely determined. In one of his books called "Two treatises of government" he used a world called: natural rights.[7] When he mentioned it, he meant property, liberty and life. He believed that in a natural state, where an individual can decide his or her reactions, it is determined only by his or her own conscience. Social life claims law to play an efficient role in limiting the freedom of a person but only if it hurts rights of another one.

The freedom of contract plays an important role in not just guiding the parties but on the other hand to keep secured the parties free wills.[8] Law respects their will and gives them the freedom to choose not only the way how to establish the contract but also to freely choose the content of it.

This important principle can be found in the Hungarian Civil Code[9] too. It says: "The parties are free to define the contents of contracts, and they shall be entitled, upon mutual consent, to deviate from the provisions pertaining to contracts if such deviation is not prohibited by legal regulation. Contracts in violation of legal regulations and contracts concluded by evading a legal regulation shall be null and void, unless the legal regulation stipulates another legal consequence. A contract shall also be null and void if it is evidently in contradiction to good morals."

As it can be read above the Hungarian Civil Code strictly establishes not only the meaning of this principle but the consequences of avoiding these rules. The free will of a contractual party means four separated freedoms. First of all it focuses the beginning of the contractual relationship. This principle should be kept in front of the eyes so contractual parties have the freedom to decide weather they want to make a contract or not. The freedom of establishing a contract is the first basic step under the principle. However in some cases when situation is quite un-regular such as when it has effects on public interest or in critical general interest cases it was questioned if this freedom should be kept or wouldn't be more efficient to make some special rules for these situations and use some force.[10] Exceptions were established and can be used in special cases, when one or both parties have no other choice but to sign the

contract because of their special role they play in an exact situation .It is a kind of force that does not let the parties to choose there own way but it is strictly prescribe the exemplary way.

Before any force would be used law intends that the parties should try to reach an agreement without a procedure in front off a court. First of all contractual parties should try to reach an agreement on a way that they challenge to move the different opinions closer and the result of it would be an agreement on everybody's satisfaction. However it would be the ideal ending but unfortunately several cases do not turn out this way. In the latter case a judicial action is necessary, and the court can make the contract and decide its content. It sounds pretty strict, so it can be argued from different directions: does not it conflict the principle of contractual freedom. Legislators felt this contradiction and to ensure the safety and correct interpreting of the principle they established and kept a balance between free will and the force of law.

A supplementary rule was developed to complete this opposition and dissolve the contrast. According to it the court has right to establish the contract against the intention of the involved parties, just in case if the contractual parties do not have the evidence that they are unable to keep the contract or the contract would cause negative harmful effect on national economy. This rule ensures that in this two cases mentioned above even court does not have right to form a contract against the parties free wills.

After all as we read carefully and understand the working method of this principle we can deduct the consequences from it. It points out that the freedom of contract will not be hurt and it can be kept even in these special cases.

Hungarian legislator found the balance between forcing it out when it needs but in other cases he ensures the parties to act according to their wished way. Contractual freedom has been a vital concern not only for the Hungarian lawyers but for the experts of other countries for a long time. It is and it will always be a challenge for jurists to find the ideal balance on this unstable field.

If we take a closer look at the Anglo-American legal system that originates from the United Kingdom and we compare it to a Continental legal system focusing on the freedom of contract we can easily realize that in Great Britain and in the US law found a similar solution as our legal system just they reached it on a slightly different way - according to there legal traditions. The Anglo-Saxon legal systems are also letting private parties to act freely when making advantages on their own interests from contracts.

Putting besides the differences between the two legal systems we can say that there are several familiar statements about this principle. US courts such as Hungarian Courts also have the right to use force and develop an agreement. The Constitution of the United States of America contains a Contract Clausula. Its origin can be brought back to the fundamental rights of the Ninth Amendment, which is part of the Constitution. Jurists reference to it in several cases. It was created to halt the unnecessary state interference in valid contracts. John Marshall, the famous Chief Justice of the Supreme Court realized the importance of this issue and took special attention to defend the freedom of contract. In His statement he underlined the importance of all mayor principles and he pointed on that there is a strong link between the United States Constitution and contracts. If we travel back in time and examine the ratification of our conclusion in the Anglo-Saxon case-law, we can easily find cases that were influenced and decided using this principle.

I would like to highlight two famous milestones: Flecher v. Peck and Lochner v. New York.[11]

Flecher and Peck was the first case in which the Supreme Court made a decision that the state law is unconstitutional. This case was about a private land speculation ended with an unexpected way. Judge Marshall denied to invalidate the contract even it was illegally secured. Another famous case was Lochner v. New York. Lockner was fined because he violated the state law when he decided to limit the working hours in his bakery. In this case the court decided for Lochner. The judge emphasised that: ”The right to purchase or to sell labor is part of the liberty protected by this amendment..."

In both cases we can see how court predicates the importance of this principle.

But as I mentioned above, freedom of contract can be examined in four fields of contract law.

The second field of it is the freedom of choosing the contractual parties.

Contractual parties have not only autonomy to decide weather they want to make a contract but they also have their freedom to decide with who they want to be in this particular contractual relationship.

If we separate the four fields where this principle lives, we can definitely say that law is giving the largest freedom in this field by letting the parties to make their free choice of their contractual parties. In contracts parties can make some kind of promises that others can rely on. It has its danger when parties sign an agreement and it creates a wide range of obligations to them. Contractual liability is working as a kind of promissory liability. Parties make promises for future and usually the agreement is carried out later. But in case some unexpected thing happens and the parties will not be able to act as they promised, it carries out negative consequences. Promises will be legally enforceable in case the parties do not act as it is put down in the agreement.

Establishing a contract with someone is a question of trust in one hand. Whether a contract will be kept or not, people cannot say for sure. Usually people do not like risking and it is rational that they try to minimize their possible loss in every field of private and business relations.[12] Choosing the contractual party will make a deep effect on the whole agreement. Whether it will be successfully carried out or it will be neglected, or leads to enforcement in front off the court. In my opinion choosing the other party carefully can be such an important decision as the content of the contract itself. A really wise decision is needed in this field.

The third area where this principle has duty is the free choice of the type of the contract.

The general rule itself says that contractual parties have the right to decide the type of their agreement. This means that the contractual parties can establish their own decision without any influence, when they choose from the various types of contract forms. As in other fields of law some exceptions can also be found. These are called type requirements. There role is to determine the exact type of the contract when it is needed and refill the gap in these situations.

Although there is a growing tendency to reduce the number of type requirement rules and ensure the freedom of choice for parties, it should not be forgotten that these type

requirements have their advantages too. They make it easy to review and to take control on these contracts and because of the publicity mistakes can be found and correct quickly.

If we take a look at the rules in the Hungarian Civil Code, we can see that legislation took effort to reduce the number of these type requirements. Limiting type requirements are a kind of setting up groups of various kinds of contracts. A contract can fit into these groups by its similarities. It can be collected together due to the content or function or the object of performance too. Contracts can also be separated on a way if they are special and focusing on a unique case or connecting to a very typical everyday transaction. Depending on the numbers of the party members we can also create contract groups, where only two parties are in the contractual relationship. Typically sale/purchase of a real estate contracts belong to this group in which there is usually one person on both sides: a seller and a buyer. But in some contracts several parties can be found. This type of contracts usually forms between big companies or other legal entities, when they decide some fusion or cooperation.

I think it is not necessary to completely liquidate these requirements from our legal system because they are very useful in a complicate situation, when some guideline would be needed to find the best form of the contract. Evidence and demonstration is a hectic part in any judicial procedure. The form requirements ensure that in more complicated contractual relations, where the legislator left several ways for the parties to follow, a written contract could verify the original intention of the parties and the original circumstances of its birth.

The last area, where this principle takes a remarkable effect is the freedom of the content itself.

Contractual parties can fulfil their contract with all kinds of contents not prohibited directly by the law. Parties can promise for example: to produce a product, deliver it, fix it, destroy it, change it .They can decide the price, the delivery date, etc. They have all the rights to decide the contents of their contract absolutely free. Contract law allows them to use this mechanism and secure, stabilize and control their future obligations. The contract they sign will have an influence on their future acts. It creates reciprocal liability. When it is signed from the valid contract, rights and obligations can be carried out. It emphasis that statutory instruments in force can prescribe certain content elements of the contract and declare that these elements are essential and obligatory part of the contract even parties decide otherwise. The restriction of power disposition can be bilateral or unilateral. Unilateral means that it is only restricting a party member on one side of the contract and does not effect both sides. The typical example where this kind of restriction can be found is the consumer protection regulation. An insurance contract cannot be changed on a way to make disadvantages for the insured. It is strictly prohibited. This rule effects the insurance company and protects the insured giving him security. But this all is about the balance of interests and rights as it is common in every parallel relation in civil law.

The freedom of contract is not only a declaration among the principles. The nature of contract law and the importance of this area have its source from this principle. Almost all modern legal systems weather these are Continental or Anglo-Saxon ones acknowledge this principle and fulfill it with a warranty-like meaning. Contract law seems to be a founder in a successful economy and business relation. Under the European Union trade and common market could easily be ineffective without these major rules. Harmonization needs only in some less important area about the law of contracts, but the basic rules are rather similar. The free

movement of an autonomous entity of law means not only the freedom of choice and individual act but a free choice in contractual relations.

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[2] Bíró György: Kötelmi jog. Közös szabályok. Szerződéstan, Novotni Kiadó, Miskolc, 2004. p. 235.

[3] See also the formation of a contract between absent parties or the rules of electronic commerce under establishing a contract.

[4] A secure and effective online system, where transactions can be generated without sending direct data to the seller. www.paypal.com

[5] The economic meaning of freedom to contract see: Cserne Péter: Szerződési szabadság és paternalizmus: adalékok a szerződési jog közgazdasági értelmezéséhez, http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=peter_cserne

[6] The most typical form of the separated Acts can be found int he legal system of the United Kingdom.

[7] Fézer Tamás: A természetjogi gondolkodás fejlődése és hatása a személyiségi jogi elméletekre, Jogelméleti Szemle 2004/3. (http://jesz.ajk.elte.hu/fezer19.html)

[8] Younkins, Edward: Freedom to Contract, Liberty Free Press, 1/2000., http://www.quebecoislibre.org/younkins25.html

[9] Act IV of 1959. In Hungary the recodifying process of the Civil Code is in progress. The new Code maintains the present rule of freedom of contract.

[10] Duxbury, Robert: Contract Law – Nutshells, Sixth Edition, Thomson, Sweet & Maxwell, London 2003. p8.

[11] See Ruff, Anne: Contract Law – Nutcases, Third Edition, Thomson, Sweet & Maxwell, London 2002.

[12] Storme, Matthias: Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law, http://webh01.ua.ac.be/storme/Storme-Juridica.pdf